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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber") is the major national federation of business and professional organizations, consisting of over 3,700 state and local chambers of commerce and trade and professional associations, and a direct membership in excess of 86,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

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* This brief is filed with the written consent of all parties, pursuant to Supreme Court Rule 42.

The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch, and the independent regulatory agencies of the Federal Government. Such representation constitutes a significant aspect of the Chamber's activities and includes participation as *amicus curiae* in numerous cases before this Court.

The question presented in this case represents a recurrent and substantial problem which is of vital concern to the Chamber and its members. At issue is the continued viability of section 8(b)(4)(ii)(B) of the National Labor Relations Act, which Congress designed specifically to protect neutral parties from injury resulting from the labor disputes of others. The decision of the court below effectively deprives neutrals of that protection, and thus defeats the noble purpose for which the section was enacted. Necessarily, the Court's decision in this case will have a significant impact on the rights of many Chamber members, and their manner of doing business. It is for this reason that the Chamber respectfully submits its views.

RELEVANT STATUTORY PROVISIONS

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended,[1] provides in pertinent part, that it shall be an unfair labor practice for a union:

> [T]o threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> * * *
>
> forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person .... *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

[1] 29 U.S.C. § 158(b).

It is further provided that:

> [N]othing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . .

ARGUMENT

I. THE LABOR BOARD PROPERLY FOUND THAT WHERE A UNION'S PICKETING HAS THE PREDICTABLE EFFECT OF INDUCING CUSTOMERS NOT TO TRADE WITH A NEUTRAL, SECTION 8(b)(4) IS VIOLATED.

A. Introduction

This case presents a question which strikes at the heart of the protections afforded by the National Labor Relations Act to innocent third parties from harm resulting from the labor disputes of others. At issue is whether a union, which has a labor dispute with one party, is permitted to engage in picketing which may effectively destroy the business of another, disinterested party. This question necessarily requires a focus on the legislative purpose in enacting the prohibitions on union secondary activity.

B. The Legislative History of Section 8(b)(4)

Section 8(b)(4) was added to the National Labor Relations Act in 1947 by the Taft-Hartley Amendments, and it is in the history of this enactment that Congress' purpose must in the first instance be sought. That history demonstrates Congress' deep concern with certain activities of labor unions which were deemed objectionable. In describing the secondary activity provisions of the Act, Senator Taft explained:

> This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. The Senator will find a great many decisions written by my father which hold that under the common law a secondary boycott is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.

II Leg. Hist. of Labor Management Relations Act 1106 (1947).

It is thus clear that the principal purpose of section 8(b)(4) was to confine labor disputes to the parties with whom the conflict had arisen. The section was expressly designed to protect innocent third parties

from pressures generated by such conflicts, and Congress intended the proscriptions of the Act to be broad enough to realize this objective.

Similarly, the legislative history of the 1959 amendments to the Act reflect this earlier understanding. The amendments were intended to strengthen and reinforce the prohibitions on secondary activity contained in the Act. *See* II Leg. Hist. of Labor Management Reporting and Disclosure Act 1568 (1959) (remarks of Congressman Griffin). Addressing the provision which is now section 8(b)(4)(ii)(B), Senator Kennedy, who chaired the 1959 Conference Committee on the House and Senate bills to amend the NLRA, recognized Congress' intent to broadly prohibit secondary picketing when he stated:

> [T]he House bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not say that there was a strike in a primary plant. . . . *Under the present language of the conference we agreed that there would not be picketing at a secondary site.* What was permitted was the giving out of handbills or information through the radio, and so forth.

II Leg. Hist. of LMRDA 1389 (emphasis added). And, the objective to ban secondary picketing was acknowledged by other Members of Congress critical of the breadth of the provisions. *See NLRB* v. *Fruit Packers,* 377 U.S. 58, 85-88 (1964) (Harlan, J., dissenting); *National Maritime Union of America, AFL-CIO* v. *NLRB,* 346 F.2d 411, 416 (D.C. Cir.), *cert. denied,* 382 U.S. 940, *rehearing denied,* 382 U.S. 933 (1965).

It is therefore certain that Congress was deeply concerned with shielding neutral employers from the labor

disputes of others, and that section 8(b)(4)(ii)(B) was intended to be sufficiently broad to accomplish this objective.

Moreover, this Court has recognized that concern of Congress, expressed in its enactment of section 8(b)(4), with "shielding unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Building Council,* 341 U.S. 675, 692 (1951). *See, e.g., Houston Contractors Ass'n* v. *NLRB,* 386 U.S. 664, 668 (1967); *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612, 624 (1967).

C. This Court's Decision in Tree Fruits and Its Progeny

This Court's decision in *NLRB* v. *Fruit Packers,* 377 U.S. 58 (1964) (hereinafter referred to as *"Tree Fruits"*), was relied upon by the court below to justify its reversal of the Labor Board, and bears heavily on the issue posed in this case. *Tree Fruits* concerned a union's picketing of the stores of a neutral employer, Safeway, in an effort to dissuade the public from purchasing apples packed by a firm with which the union had a dispute. The Labor Board held that section 8(b)(4)(ii)(B) prohibits all consumer picketing at the establishment of a neutral. According to the Board, the natural and foreseeable result of such picketing was to force the neutral to curtail or discontinue its purchases from the primary employer and, the Board believed, a union which engages in such activity effectively intends to bring about "this natural and foreseeable result." *Fruit & Vegetable Packers, Etc., Local 760,* 132 N.L.R.B. 1172, 1178 (1961).

Reversing the Board's decision, this Court acknowledged that the union's conduct fell within the literal

proscription of section 8(b)(4)(ii)(B), but held that the facts of the case did not warrant a finding that the Act had been violated. 377 U.S. at 71-72. In reaching this conclusion, the Court was seemingly impressed with the fact that, as a practical matter, the picketing had the limited effect of inducing a boycott of a single product which represented an insubstantial part of Safeway's entire business. The Court was not faced with, and made no attempt to analyze, the extent to which surrounding circumstances (such as the impact of the picketing and the nature of the neutral's business) should be considered in determining whether picketing violates the secondary provisions of the Act. The Court simply drew a distinction between picketing which persuades customers to cease all trading with the neutral, and picketing which is limited to dissuading the neutral's customers from purchasing the product of the primary employer who is the object of the union's dispute. Thus, the Court observed that:

> Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product.

377 U.S. at 70.

But this distinction, which fit neatly within the facts of *Tree Fruits,* where the struck product was such an insignificant part of the neutral's business that its entire business would not likely be affected by the picketing, becomes far more difficult to apply in cases such as the present where the product represents a substantial portion of the neutral's business. Mr. Justice Har-

lan perceived the difficulties inherent in the Court's analysis when he declared:

> The distinction drawn by the majority becomes even more tenuous if a picketed retailer depends largely or entirely on sales of the struck product. If, for example, an independent gas station owner sells gasoline purchased from a struck gasoline company, one would not suppose he would feel less threatened, coerced, or restrained by picket signs which said 'Do not buy X gasoline' than by signs which said 'Do not patronize this gas station.' To be sure Safeway is a multiple article seller, but it cannot well be gainsaid that the rule laid down by the Court would be unworkable if its applicability turned on a calculation of the relation between total income of the secondary employer and income from the struck product.

Id. at 83.

The Court did not address the hypothetical posed by Mr. Justice Harlan, and thus did not reach the issue now before the Court. However, the hypothetical demonstrates the difficult, if not impossible, task of applying the distinction drawn by the Court in *Tree Fruits* to more complex and varied factual settings, while adhering to Congress' purpose in enacting section 8(b)(4)(ii)(B).

Since *Tree Fruits,* the Board and the courts of appeals have had numerous occasions to examine the parameters of the Court's decision in varying factual settings. The Board has consistently held, correctly we believe, that *Tree Fruits* did not lay down an inflexible rule validating all picketing which is purportedly aimed at persuading the public not to purchase a "struck product." In the Board's view, union conduct is unlawful if it has the potential or predictable effect

of inducing neutrals to cease dealing with a primary employer.[2] Thus, the Board has found a violation of section 8(b)(4)(ii)(B) where a union picketed neutrals in an effort to dissuade customers from buying a product which constituted between eighty-one and ninety-eight percent of the gross income of the neutrals,[3] and where the struck product had become so incorporated in the business of the neutral that it was impossible for the consumer to boycott the struck product without also boycotting the neutral's entire business.[4]

Similarly, all of the appellate courts which have addressed the question, save the court of appeals below, have held that *Tree Fruits* is limited to its unique factual setting. Thus, in *Hoffman* v. *Cement Masons Union Local 337,* 468 F.2d 1187 (9th Cir. 1972), *cert. denied,* 411 U.S. 986 (1973), where the union picketed a secondary site urging the public not to buy homes built by a contractor with whom it had a dispute, the court held that, in *Tree Fruits*:

> The Supreme Court . . . approved picketing of retail food stores that was *narrowly confined to requesting consumers not to purchase the struck product, which was one of many products sold in the stores.* Instead, we have here a single product for sale by the secondary, the homes, a part of

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[2] Local 14055, Steelworkers, 211 N.L.R.B. 649 (1974), *enforcement denied,* 524 F.2d 853 (D.C. Cir. 1975), *vacated and remanded,* 427 U.S. 807 (1976), *complaint dismissed because of mootness,* 229 N.L.R.B. 302 (1977).

[3] *See* note 2, *supra.*

[4] American Bread Co., 170 N.L.R.B. 91 (1968), *aff'd,* 411 F.2d 147 (6th Cir. 1969); Honolulu Typographical Union No. 37, 167 N.L.R.B. 1030 (1967), *aff'd,* 401 F.2d 952 (D.C. Cir. 1968).

which, the masons' work, was produced under the disputed labor conditions.

> Congress determined that *when a union's interest in picketing a primary employer at a 'one product' site, was in direct conflict with the need to protect such neutral employers from the labor disputes of others, the neutral's interests would prevail.*

468 F.2d at 1191 (emphasis added; citations omitted). *Accord, NLRB* v. *Twin City Carpenters Dist. Council,* 422 F.2d 309 (8th Cir. 1970); *American Bread Co.* v. *NLRB,* 411 F.2d 147 (6th Cir. 1969).

These decisions reflect a proper interpretation of section 8(b)(4)(ii)(B), consistent with the purposes of the section, and reasonably construe this Court's decision in *Tree Fruits.*

D. The Court Below Misapprehended the Scope of Tree Fruits and Reached a Result at Odds With the Purpose and Intent of Section 8(b)(4)

In the instant case, the union picketed five land title companies, each of which received ninety to ninety-five percent of its income from the issuance of title insurance policies underwritten by Safeco, the employer with which the union had a primary dispute. The small remaining portion of the business of each title company was ancillary to the issuance of the Safeco policies, and involved title searches and escrow services. The Board found that the title companies were neutrals in the dispute between Safeco and the union,[5] and that the union's action "would predictably involve a virtu-

[5] This finding was affirmed by the court of appeals below, —— F.2d ——, 101 L.R.R.M. at 3086-87, and is not before the Court.

ally complete boycott of the land title companies," thereby "dragging" the land title companies into the union's dispute with Safeco. 226 N.L.R.B. at 757. In finding a violation of section 8(b)(4)(ii)(B), the Board determined that both the character and the magnitude of the picketing in this case differed significantly from the picketing involved in *Tree Fruits.*

The Board in this case thus recognized the obvious and significant differences between the union's conduct in *Tree Fruits,* which was directed to a product representing a negligible part of the neutral's business, and the picketing herein which affected virtually the entire business of the title companies.

The court of appeals, however, read *Tree Fruits* as permitting all secondary picketing which is purportedly aimed at a struck product, without consideration of the circumstances surrounding such activity. Such a literal reading of this Court's opinions may, as the Court has acknowledged, lead to "absurd and unintended results." *Michigan* v. *Mosley,* 423 U.S. 96, 102 (1975). "[The] words of our opinions are to be read in the light of the facts of the case under discussion .... General expressions transposed to other facts are often misleading." *Armour & Co.* v. *Wantock,* 323 U.S. 126, 133 (1944). Indeed, the Court has expressly cautioned that rigid rules and broad generalizations are particularly inappropriate in section 8(b)(4) cases. *Electrical Workers* v. *NLRB,* 366 U.S. 667, 674 (1961).

We submit that the court below has misapprehended the scope of *Tree Fruits* and that its decision contravenes the purposes of section 8(b)(4). The court's decision ignores the consequences of the picketing and, specifically, the impact which such picketing will neces-

sarily have on a company which relies substantially on the single product which is the object of the union's wrath.

Indeed, the court's decision permits unions to accomplish that which Congress has clearly forbidden them to do directly—to picket a neutral with which the union has no labor dispute. Such action is clearly an unlawful secondary boycott. Yet, the union's action in this case, sanctioned by the court of appeals, is identical in substance and effect. Allowing such picketing subverts the intent of Congress to establish a scheme which protects neutral employers from the labor disputes of others.

It is plainly clear that the union's conduct in the case at bar falls squarely within the proscriptions of section 8(b)(4)(ii)(B). The picketing was directed at a product which constitutes virtually the entire business of the neutral title companies; accordingly, the Board's finding that the picketing had the predictable effect of forcing the neutrals to cease dealing with Safeco, is clearly correct. The court of appeals declared that *Tree Fruits* does not permit the Board to examine the effect or impact of the picketing in assessing its legality. —— F.2d ——, 101 L.R.R.M. at 3092-93. In this respect, the court below is plainly mistaken. This Court has expressly held that union conduct is permissible, even if it entails some disruption of a secondary's business, but only where "*the foreseeable result* of the conduct could be, while disruptive, *so slight* that the 'cease doing business' requirement is not met." *NLRB* v. *Operating Engineers,* 400 U.S. 297, 304-05 (1971) (emphasis supplied). But where, as here, the foreseeable consequences of secondary activity are far greater than "slight," the union's conduct clearly

falls within the zone of activity prohibited by section 8(b)(4). *Id.* at 305.

Aside from the foreseeable consequences of the union's activity herein, it is equally clear that the picketing was intended to force a virtually complete cessation of the neutral's business with Safeco. This Court has acknowledged that, in secondary boycott cases, the nature of a union's action shows intent. *Electrical Workers* v. *NLRB,* 366 U.S. 667, 674. Where the action is directed at a substantial portion of the neutral's business, the "clear implication" of the union's conduct is to bring the neutral companies "to their knees" to force a change. *NLRB* v. *Operating Engineers,* 400 U.S. at 305. Indeed, it is difficult, if not impossible, to envision a clearer case than the present in which a union's conduct was designed to force the neutral companies to cease doing business with the primary employer.

These considerations compel the conclusion that the court below has mistakenly construed *Tree Fruits* well beyond its intended scope. The court's decision exalts form over substance in its view that *Tree Fruits* mandates the conclusion it has reached. By its failure to take account of the circumstances surrounding the picketing and the foreseeable results of the union's conduct, as required by section 8(b)(4)(ii)(B) and by this Court's decision in *NLRB* v. *Operating Engineers,* 400 U.S. at 304-05, the court below has effectively rendered the section a nullity and has deprived neutral parties of the protection which Congress believed necessary and desirable to afford.

As a result, we believe that the Court should make clear that its decision in *Tree Fruits* is limited to the

special circumstances present therein. Moreover, we urge the Court to accord full weight to the purposes underlying section 8(b)(4), namely, the protection from injury of neutral parties in labor disputes not their own. Accordingly, we submit that where the nature of the neutral's business, or of the secondary picketing, may predictably or potentially force a cessation of business, section 8(b)(4)(ii)(B) of the Act has been violated.

II. PROPERLY CONSTRUED, SECTION 8(b)(4) DOES NOT CONTRAVENE FIRST AMENDMENT PRINCIPLES.

The court below believed that its construction of section 8(b)(4)(ii)(B) was "necessary to avoid a possible confrontation with the First Amendment." —— F.2d ——, 101 L.R.R.M. at 3093. We urge that the court of appeals erred in its belief that its interpretation is mandated by constitutional principles. Properly construed to effectuate the purposes for which it was enacted, section 8(b)(4)(ii)(B) does not run afoul of constitutional limitations.

This Court long ago held that secondary picketing in violation of section 8(b)(4) of the National Labor Relations Act may constitutionally be enjoined. *Electrical Workers, Local 501* v. *NLRB*, 341 U.S. 694, 705 (1951). The Court more fully discussed the constitutional question in the context of consumer picketing in *Hughes* v. *Superior Court*, 339 U.S. 460 (1950), when it declared:

> [W]hile picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.' . . . Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication.

Id. at 464-65 (citation omitted).

The Court in *Hughes* concluded that, "picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted *or the purpose which it seeks to effectuate* gives grounds for its disallowance." *Id.* at 465-66 (emphasis added). In short, picketing in furtherance of an illegal objective, may constitutionally be prohibited.

That the prohibitions of section 8(b)(4)(ii)(B) are properly circumscribed in the constitutional sense is unmistakably clear. The limited regulation of union activity accomplished by the section furthers a legitimate objective of Congress to protect neutral employers from the coercive effects of the labor disputes of others. Moreover, as hereinbefore stated, proper application of section 8(b)(4)(ii)(B) is restricted to situations where the predictable effect of such picketing on the neutral's total business is more than insubstantial. Section 8(b)(4)(ii)(B) is further limited to picketing; other available means of communication are fully protected by the section's proviso which exempts from its prohibitions publicity, other than picketing, for the purpose of truthfully advising the public about a labor

dispute. *See Tree Fruits,* 377 U.S. at 93-94 (Harlan, J., dissenting).

These considerations have led the courts to conclude that the first amendment is not a bar to application of section 8(b)(4) to prohibit consumer picketing, where the intent or predictable effect of such picketing is to induce a cessation of trading with the neutral. *See, e.g., Hoffman* v. *Cement Masons Union Local 337, supra,* 468 F.2d at 1191 n.1; *Honolulu Typographical Union No. 37* v. *NLRB, supra,* 401 F.2d at 957 n.11; *Bedding, Curtain & Drapery Workers Union, Local 140* v. *NLRB,* 390 F.2d 495, 503 (2d Cir.), *cert. denied,* 392 U.S. 905 (1968); *National Maritime Union* v. *NLRB, supra,* 346 F.2d at 420. *Electrical Workers, Local 501* v. *NLRB* and *Hughes* v. *Superior Court* expressly support this conclusion.

In sum, section 8(b)(4)(ii)(B), as applied to prohibit the picketing herein, is constitutionally permitted.

CONCLUSION

For all of the foregoing reasons, we urge that the decision of the court of appeals be reversed, and the Board's order be enforced.

Respectfully submitted,

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